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No. 99-1815

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KENTUCKY RIVER COMMUNITY CARE, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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1. The principal issue in this case is the reasonableness of the interpretation that the National Labor Relations Board (NLRB or Board) has given the phrase "independent judgment" in Section 2(11) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 152(11). As we explain in our opening brief, under the Board's interpretation, an employee does not exercise "independent judgment" that triggers supervisory status under Section 2(11) when he uses ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards. NLRB Br. 11. The Board has applied that analysis over many years to both professional and non-professional employees in various employment contexts. *Id.* at 16-20. And, since this Court's decision in

NLRB v. *Health Care & Retirement Corp. of America* (*HCR*), 511 U.S. 571 (1994), the Board has applied the traditional analysis in the health care field. NLRB Br. 21.

Respondent's primary contentions are that the Board's interpretation of "independent judgment" creates a false dichotomy between professional judgment and independent judgment (Br. 9-13), eliminates professionals as supervisors (Br. 17-21), and precludes supervisory status based on responsible direction of other employees (Br. 13-16). There is no merit to any of those contentions, all of which rest on an inaccurate characterization of the Board's interpretation.[1]

a. Respondent erroneously asserts (Br. 10) that, under the Board's interpretation, "when a professional utilizes 'professional or technical judgment' in the responsible direction of employees, that person is not using 'independent judgment.'" Respondent thus asserts that, in the Board's view, the exercise of "professional judgment" is "*always* routine" (Br. 11) and "never involves the exercise of independent judgment" (Br. 16). Contrary to those assertions, the Board does not take the view that an employee who uses professional or technical judgment in performing one of the supervisory duties specified in Section 2(11) cannot also be exercising "independent judgment." Indeed, in our opening brief, we identify several cases in which the Board found that professional or technical employees exercised "independent judgment." NLRB Br. 19 n.7.

[1] Respondent also incorrectly asserts (Br. 9) that the Board's interpretation is "a disguised attempt to revive the patient care analysis" that this Court rejected in *HCR*. As we have explained above, the Board's interpretation is its long-standing, traditional analysis, which it applies in all employment contexts and to all types of employees, not just in the health care field or to nurses. Further, as we explain below, the Board's interpretation turns on the extent of discretion exercised by the employee whose supervisory status is in question, not on the purpose for which he exercises that discretion.

As we have explained, the Board has long held that whether an employee is a supervisor depends on the *degree* of judgment or discretion exercised by the employee in the performance of any supervisory duty specified in Section 2(11). When an employee, based on professional or technical skill or experience, exercises limited discretion to direct others in accordance with employer-specified standards (as expressed in blue-prints, established work procedures, and the like), the Board has found that the employee does not exercise "independent judgment" that triggers supervisory status. If, however, an employee exercises significant discretion to direct others within only general confines, the Board has found that the employee exercises "independent judgment" under Section 2(11). See NLRB Br. 16-21 & nn. 5-8. In short, the Board's interpretation recognizes that an employee's exercise of professional or technical judgment may also entail the exercise of "independent judgment" if the employee's judgment is not significantly constrained by external sources. The constraints may flow from a variety of sources, including written employer standards and established professional or technical routines or work procedures, but whether the employee exercises "independent judgment" turns on the extent of his discretion.[2]

Amicus Society for Human Resource Management (SHRM) acknowledges (Br. 19 n.30) that "an employer may, in certain instances, so hamstring the exercise of a would-be

[2] Respondent suggests (Br. 10-11) that the Board's interpretation is inconsistent with *Avon Convalescent Center, Inc.*, 200 N.L.R.B. 702 (1972), enforced, 490 F.2d 1384 (6th Cir. 1974), but that case has no precedential value. Even at the time it was decided, which was during the period when the Board was applying the "in the interest of the employer" test for determining the supervisory status of nurses that this Court rejected in *HCR*, *Avon* was not in accord with the run of the Board's decisions in the health-care field. For that reason, *Avon* was subsequently overruled. See *Beverly Enters.—Ohio*, 313 N.L.R.B. 491, 494 n.12 (1993).

supervisor's judgment so as to prevent the exercise of 'independent' judgment," but contends that "the facts of this case do not demonstrate any 'employer-specified standards' that so constrained the exercise of supervisory judgment." If, by "hamstring," SHRM means impose limitations so strict as to leave the employee no room for thought (see *Beverly Enters., Va., Inc.* v. *NLRB*, 165 F.3d 290, 303 (4th Cir. 1999) (en banc) (Phillips, J., dissenting)), we agree that respondent did not confine the judgment of the registered nurses (RNs) in this case to *that* extent. The Board, however, has properly rejected the view that an employee is a supervisor whenever he exercises some judgment in directing other employees, because that view is not supported by the language or purpose of the Act. See NLRB Br. 22-32. The relevant inquiry under the Board's interpretation of "independent judgment" is the degree to which the employee's judgment is limited, and the facts of this case show that respondent significantly restricted the RNs' discretion. See *id.* at 42-45.

SHRM is also mistaken in contending (Br. 19 n.30) that the Board has, in practice, applied its interpretation to find that nurses do not exercise "independent judgment" even absent external constraints on their discretion. In the cases cited by SHRM (*ibid.*) in support of that contention, the discretion of the employees at issue was in fact limited by external constraints, such as employer standards, patient care plans, and professional routines.[3] Other cases since

[3] See *Loyalhanna Health Care Assocs.*, 332 N.L.R.B. No. 86, 2000 WL 1670884, *3 (Oct. 30, 2000) (nurses oversaw work of aides involving "routine aspects of patient care" pursuant to "rules and regulations governing long-term care facilities" and patient "care plans"); *Vencor Hosp.-Los Angeles*, 328 N.L.R.B. No. 167, 1999 WL 606678, *2, *5 (Aug. 5, 1999) (nurses exercised only "limited" assignment authority because assignments were based on patient needs as reflected in the "patient's plan of care" and "dictated by which team member has the obvious required skill"; nurses gave directions regarding only "simple tasks" or the "proper method" for performing recurring procedures); *Providence Hosp.*, 320 N.L.R.B. 717, 730-733 (1996) (charge nurses' "limited authority" to assign other RNs was constrained by monthly schedules, the need to "check with the shift coordinator," and reliance on the practice of asking for volunteers and using "rotational lists"; their monitoring of the work of other RNs and intervention in "acute situation[s]" was required by "state practices" and was a "routine function * * * shared by all RNs"), enforced, 121 F.3d 548 (9th Cir. 1997). *Elmhurst Extended Care Facilities, Inc.*, 329 N.L.R.B. No. 55, 1999 WL 801516, *3-*4 (Sept. 30, 1999), addressed the different issue whether nurses who filled out evaluation forms concerning aides "effectively recommend[ed]" their retention or reward.

HCR in which the Board has found employees not to be supervisors have involved similar constraints.[4]

b. A proper understanding of the Board's interpretation of "independent judgment" reveals that there is no basis for respondent's assertion (Br. 18) that the interpretation "will virtually eliminate professionals as supervisors." Under the Board's interpretation, a nurse or other professional (just like any other employee) may be found to be a supervisor if she performs one of the listed supervisory functions with sufficient discretion to constitute independent judgment.

[4] See, *e.g.*, *Carlisle Engineered Products, Inc.*, 330 N.L.R.B. No. 189, 2000 WL 569474, *1 (Apr. 28, 2000) (processors did not exercise "independent judgment" in assigning work and directing operators to change duties because directions were "based on commonsense efficiency and job priorities set by the Employer"); *Tree-Free Fiber Co.*, 328 N.L.R.B. No. 51, 1999 WL 305507, *7 (May 10, 1999) (team leader's assigning and prioritizing work for team members was not "marked by independent judgment" but entailed "routine responses to predictable, recurring work-assignment issues"); *Illinois Veterans Home at Anna L.P.*, 323 N.L.R.B. 890, 891 (1997) (nurses do not exercise "independent judgment" in assigning and directing aides when "generally [aides] are assigned to the halls where they previously had been working to provide continuity in care," the tasks performed "are set by a worksheet setting forth the care plan for each resident," and, "[i]f any special tasks arise during a shift, * * * the [nurse] will direct whoever is available to perform the task").

See, *e.g.*, *Health Care & Retirement Corp.*, 328 N.L.R.B. No. 156, 1999 WL 562096, *2 (July 27, 1999) (nurses found to be supervisors because they "exercise independent judgment when disciplining [aides], for example, by determining what category to classify a given infraction of the Employer's rules and to take the appropriate action"); *Legal Aid Soc'y of Alameda County*, 324 N.L.R.B. 796, 796 (1997) (attorney found to be supervisor because she possessed independent "authority to evaluate and effectively recommend retention and termination of the paralegals in her unit").

Although the Board's approach does not eliminate professionals as supervisors, the approach advocated by respondent would exclude most professional employees from the rights and protections of the Act. Respondent contends (Br. 11) that a "professional['s] exercise[] [of] discretion and judgment" (which is inherent in his status as a professional under the Act, 29 U.S.C. 152(12)(a)(ii)) "is the essence of independent judgment." Thus, in respondent's view, professionals exercise Section 2(11) "independent judgment" whenever they assign or direct other employees. See also Resp. Br. 20 & n.6. If, as respondent contends, a professional necessarily exercises "independent judgment" whenever he gives *any* direction to less-skilled employees, then the Act's express coverage of professionals would effectively be nullified because most professionals work with assistants.[5] As we have explained (NLRB Br. 32-33), when Congress decided to cover professional employees, it was aware that most of them routinely work with assistants. H.R. Conf. Rep. No.

[5] Moreover, the notion that *all* assignment and direction *necessarily* involves independent judgment is inconsistent with the realities of the workplace. See, *e.g.*, *Providence Hosp.*, 320 N.L.R.B. at 732 (noting that "[i]t does not require much judgment to decide that, if there is one aide, the aide covers the entire unit, or if there are two aides, the unit is split between them").

510, 80th Cong., 1st Sess. 36 (1947). Congress therefore could not have intended that this fact would suffice to prevent the coverage of "professional groups such as * * * nurses" provided for in Section 2(12). S. Rep. No. 105, 80th Cong., 1st Sess. 19 (1947).

c. Respondent also errs in contending (Br. 14) that the Board's interpretation of "independent judgment" renders meaningless Section 2(11)'s provision that an employee may be a supervisor by virtue of his authority "responsibly to direct" other employees. Contrary to respondent's contention, nothing about the Board's interpretation dictates that "only a nurse who performs * * * functions other than responsibly directing employees, can qualify as a supervisor." *Ibid.* Indeed, because the "independent judgment" requirement (and the Board's interpretation of that requirement) applies with equal force whichever supervisory function the employee exercises, it is difficult to understand why the interpretation would preclude supervisory status based on one function but not others.

In practice, of course, "an employee who exercises independent judgment * * * in directing other employees is likely to have been delegated substantial [other] authority by the employer to carry out directions to those employees." *Providence Hosp.*, 320 N.L.R.B. at 728 n.25. Because an employee's status as a supervisor is sometimes more clearly established based on that other authority, the Board has frequently found it unnecessary to reach the question whether the employee is a supervisor because he also exercises independent judgment in responsibly directing other employees.[6] See, *e.g.*, *Westwood Health Care Ctr.*, 330

[6] The Board also has elected "not to develop a full analysis of the term 'responsibly to direct' in the abstract." *Providence Hosp.*, 320 N.L.R.B. at 729. And, for reasons we have noted (NLRB Br. 21-22 n.9), this case does

N.L.R.B. No. 141, 2000 WL 309119, *6 & n.11 (Mar. 20, 2000) (unnecessary to decide "whether [nurses] had the authority under Sec. 2(11) to responsibly direct other employees" given finding that they possessed "authority to discipline employees within the meaning of Section 2(11)"); *Venture Indus., Inc.*, 327 N.L.R.B. No. 165, 1999 WL 161049, *3 & n.11 (Mar. 19, 1999) (unnecessary to decide whether supervisors "also have the authority to assign and direct work and effectively recommend the discharge of employees" given finding that they "possess supervisory authority within the meaning of Section 2(11) of the Act to discipline employees and to make effective recommendations regarding" hiring). That the Board often rests its findings of supervisory status on other grounds does not, however, mean that employees cannot be classed as supervisors based on authority responsibly to direct other employees. On the contrary, the Board has on several occasions found employees to be supervisors based on responsible direction. See NLRB Br. 19 n.7.[7]

Respondent further errs in asserting (Br. 14-16) that the Board's interpretation of "independent judgment" is inconsistent with comments made by Senator Flanders when he

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not present the issue of the proper interpretation of "responsibly to direct."

[7] See also, *e.g.*, *Gem Urethane Corp.*, 284 N.L.R.B. 1349, 1349, 1359-1360 (1987) (employee who had "considerable discretionary authority" over the other employees was a supervisor, but employees whose direction involved only "routine directions given by a more experienced worker" and who made assignments and ensured the quality of the product but "operated within narrow and circumscribed confines" "in accordance with a work order" prepared by management were not supervisors); *Bailou Brick Co.*, 277 N.L.R.B. 41, 62 (1985) (employee who, "without consultation with higher management," assigned other employees to various tasks and directed "when they should start, and when they should stop * * * used independent judgment" and was therefore a supervisor), enforcement denied in part on other grounds, 798 F.2d 339 (8th Cir. 1986).

proposed adding the term "responsibly to direct" to the Act. Senator Flanders explained that his amendment brought within the supervisory category persons "*above* the grade of 'straw bosses, lead men, set-up men, and other minor supervisory employees,' as enumerated in the [Senate Committee] report," who, although lacking authority to make "effective" changes in the status of subordinate employees, are vested with substantial "managerial duties." 93 Cong. Rec. 4677-4678 (1947) (emphasis added). Senator Flanders gave no indication that he intended the amendment also to bring within the supervisory category the "minor supervisory employees" who, consistent with the Board's administration of the Wagner Act, were excluded from the Senate Committee's definition of supervisor, despite the fact that they, in addition to performing their own work, provided limited direction for others based on technical skills or employer-specified standards. See S. Rep. No. 105, *supra*, at 4; NLRB Br. 24-32.

Senator Flanders wanted to clarify that the definition of supervisor includes an individual in charge of a "department" who does no hands-on work but, using "personal judgment[,] * * * determines under general orders what job shall be undertaken next and who shall do it." 93 Cong. Rec. at 4677-4678. Those responsibilities are similar to the duties of the industrial "foremen" in the *Packard* case, which Congress sought to overrule by enacting Section 2(11). See *Packard Motor Car Co.*, 61 N.L.R.B. 4, 22-23, further decision, 64 N.L.R.B. 1212 (1945), enforced, 157 F.2d 80 (6th Cir. 1946), aff'd, 330 U.S. 485 (1947). The duties of the RNs in this case are not comparable to those of foremen; rather, the RNs perform hands-on medical treatment and give limited direction to other members of their teams, based on their experience and special competence, pursuant to the

requirements of the residents' treatment plans. See NLRB Br. 42-43.[8]

d. As a final argument against the Board's interpretation of "independent judgment," respondent contends (Br. 21) that the interpretation is not entitled to deference because the Board "has engaged in blatant manipulation of the statute to further policy." Contrary to that contention, the Board has attempted to give concrete meaning to the term "independent judgment", which this Court has described as "ambiguous." See *HCR*, 511 U.S. at 579. As we have explained above and in our opening brief, the Board's interpretation is longstanding, widely applied, and fully consistent with the language, structure, and purpose of the NLRA. Moreover, the very reason that this Court accords "considerable deference" (*NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990)) to the Board's interpretations of the Act is that the Board has been charged by Congress with the "often difficult and delicate responsibility" "to effectuate national labor policy." *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957). See also *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly,

[8] When an employee is vested with significant discretion to direct other employees within only "general orders," as described by Senator Flanders, the Board has found that the employee exercises "independent judgment" that triggers supervisory status. See cases cited at NLRB Br. 19 n.7 and note 7, *supra*. Because the Board's approach classes as supervisors all those who exercise "genuine management prerogatives," S. Rep. No. 105, *supra*, at 4, respondent's claim (Br. 16-17) that employers will be deprived of "loyal supervisors" is unfounded.

by Congress."). There is no cause to second guess the Board's implementation of that responsibility here.[9]

2. The second question presented by this case is whether the Board permissibly requires the party who alleges that an employee is a supervisor to prove the individual's supervisory status. Respondent contends (Br. 24-26) that the Board's General Counsel should bear the burden of proving that the individual is not a supervisor. Respondent reasons (Br. 24-25) that "proving that a particular individual is an 'employee' is an element of the claim against the employer" in an unfair labor practice case under Section 8(a) of the Act, 29 U.S.C. 158(a). From that premise, respondent asserts (Br. 25) that "[b]ecause the term 'employee' is defined by the

[9] In an effort to demonstrate that the Board has not applied its interpretation of "independent judgment" consistently, respondent cites (Br. 23) five Board decisions. Two of those decisions have been overruled, and the other three cases are fully consistent with the Board's current interpretation of independent judgment. In *Great American Products*, 312 N.L.R.B. 962 (1993), the employee found to be a supervisor "assigned work, issued oral warnings, transferred employees among machines and to other departments, granted time off, and effectively recommended that employees be tried in other departments." *Id.* at 962. The Board expressly affirmed the ALJ's determination that the employee "exercised independent judgment in the performance of those functions" and "[was] not just a skilled leadman." *Ibid.* That determination was based in part on evidence that the employee in question authorized another employee to take time off without consulting other management. *Id.* at 964. In *Clark & Wilkins Industries, Inc.*, 290 N.L.R.B. 106 (1988), aff'd, 887 F.2d 308 (D.C. Cir. 1989), cert. denied, 495 U.S. 934 (1990), the employee found to be a supervisor "decide[d] when other employees [were] to work at the site and the work they [were] to perform" and had "authority to change the work employees [were] doing * * * without prior consultation with [other management]." *Id.* at 109. Finally, in *National Living Centers, Inc.*, 193 N.L.R.B. 638, 639 (1971), enforced, 462 F.2d 575 (5th Cir. 1972) (Table), the employee found to be a supervisor had "discretionary" authority to "grant time off" and "effectively recommend[ed] discharges and transfers."

Act to exclude supervisors * * * the distinction between 'employees' and 'supervisors' is an element of the Board's case." Respondent's conclusion does not follow from its premise, however, because the question whether an individual is an "employee" under the Act is separate from, and does not depend on, the question whether that individual is a "supervisor."

As this Court has explained, the definition of "employee" in Section 2(3) of the Act, 29 U.S.C. 152(3), "seems to reiterate the breadth of the ordinary dictionary definition." *NLRB* v. *Town & Country Elec., Inc.*, 516 U.S. 85, 90 (1995). Thus, "employee" encompasses any "person who works for another in return for financial or other compensation." *Ibid.* (quoting *American Heritage Dictionary of the English Language* 604 (3d ed. 1992)). In an unfair labor practice case, the Board's General Counsel bears the burden of proving that the individuals seeking relief are "employees" in that sense, to the extent that the issue is in controversy (and was not litigated in an antecedent representation proceeding (see NLRB Br. 41; pp. 14-15, *infra*)).[10]

Whether such "employees" are "supervisors," however, is a separate question. The answer to that question does not depend on, and is analytically distinct from, whether they are "employees." See *New York Univ. Med. Ctr.* v. *NLRB*, 156 F.3d 405, 413 (2d Cir. 1998) (explaining that the Board had carried its burden of proving that the disputed individuals "are employees of NYU Medical Center," but "they may or may not *also* be supervisors," a status that the employer bears "the burden of establishing"). As we have

[10] It is evident from the record that the registered nurses at issue in this case meet this definition of "employee," and their status has not been challenged by respondent. Cf., *e.g.*, *WBAI Pacifica Found.*, 328 N.L.R.B. No. 179, 1999 WL 676522, *6 (Aug. 26, 1999) (finding certain unpaid staff workers not "employees" under Section 2(3)).

explained (NLRB Br. 38), the text of Section 2(3) casts "any individual employed as a supervisor" as an exception from the broad definition of "employee." See *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891 (1984); see also *Town & Country Elec.*, 516 U.S. at 90 (noting that the Act's definition of employee "contains a list of exceptions"). If an "employee" is also a "supervisor," then the prohibitions against unfair labor practices contained in Section 8(a), which would otherwise constrain the employer, do not apply. Accordingly, if the employer contends that individuals shown by the General Counsel to be "employees" are also "supervisors," the employer properly should bear the burden of proving that claim. As this Court has explained, "the general rule of statutory construction [is] that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948).[11] See also *NLRB* v. *Transportation Mgmt. Corp.*, 462 U.S. 393 (1983) (Board can require employer to prove a fact that Board reasonably construes as an affirmative defense to an unfair labor practice charge).

Amicus American Health Care Association (AHCA) mistakenly contends (Br. 7-10) that construing supervisory status as an affirmative defense in an unfair labor practice case and placing the burden of proving that status on the employer is not consistent with *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries*, 512 U.S.

[11] Amicus American Health Care Association seeks to avoid the force of that principle by contending (Br. 16), based on the legislative history of Section 2(11), that " 'supervisory status' is *not* an exemption from the Act, but an additional protected classification under the Act." But neither that history nor the statutory text supports its contention. Moreover, if Congress had wished to depart from the long-standing rule of statutory construction reiterated in *Morton Salt*, Congress could have provided a different allocation rule in the text of the Act, but it did not.

267 (1994). In *Greenwich Collieries*, *id.* at 276-278, the Court explained that the Board's allocation of the burden of proof in *Transportation Management* was permissible because "the NLRB first required the employee to persuade it that antiunion sentiment contributed to the employer's decision," and "[o]nly then did the NLRB place the burden of persuasion on the employer as to its affirmative defense" that it would have fired the employee for permissible reasons in any event. Likewise, in an unfair labor practice case, the employer is required to bear the burden of proving that individuals are supervisors only *after* the General Counsel has proved that the individuals are "employees" as defined in *Town & Country* (if that question is in dispute). See *New York Univ. Med. Ctr.*, *supra*. Placing the burden of proving supervisory status on the employer in those circumstances is fully consistent with *Greenwich Collieries*.

AHCA also errs in contending (Br. 22) that, even when (as in this case) the supervisory issue has already been resolved in a representation proceeding, the same issue must be redetermined if the employer precipitates an unfair labor practice proceeding by refusing to bargain with the certified union. That contention—which would tend to prolong labor disputes, contrary to the Act's basic purpose—ignores the settled principle that, in the absence of newly discovered evidence or special circumstances, the General Counsel is not required to relitigate matters already decided in the underlying representation case. See *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 162 (1941); see also NLRB Br. 41. Although AHCA seeks to avoid the force of that rule by suggesting (Br. 22) that a purported "lack of procedural safeguards" casts doubt as to whether "supervisory status is ever truly 'litigated'" in representation cases, that suggestion is without basis.[12] Moreover, even if relitigation of matters already decided in representation cases were required, the Board's General Counsel would not bear the burden of proving supervisory status in that relitigation, for the reasons we have explained above. See pp. 12-14, *supra*.

3. a. In our opening brief, we explain that the Board, applying its interpretation of "independent judgment" and the proper allocation of the burden of the proof, reasonably concluded that respondent's RNs are not "supervisors." See NLRB Br. 42-48. Respondent, however, contends (Br. 28-36) that the RNs are supervisors even under the Board's interpretation of "independent judgment." That contention rests primarily on job duties that the RNs purportedly perform in their capacity as "building supervisors." See, *e.g.*, Resp. Br. 28, 30. Respondent's contention is not supported by the record and fails to take into account that respondent bears the burden of proving the RNs' supervisory status.[13]

Respondent asserts (Br. 35) that the building supervisors "visit the units to check the coverage and, if necessary, determine in their judgment which employees to move from one unit to another." But the record evidence that respon-

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[12] AHCA complains (Br. 21) that the Regional Director, rather than the hearing officer who "hears the evidence[,] * * * make[s] *de facto* credibility determinations insofar as he resolves testimonial conflicts by finding the facts to be as one side or the other posits." However, it is settled that due process does not require that "the decider must actually hear the witnesses or be furnished a report on their credibility" in Board representation proceedings. *Utica Mut. Ins. Co.* v. *Vincent*, 375 F.2d 129, 132-134 (2d Cir.), cert. denied, 389 U.S. 839 (1967).

[13] To the extent respondent's claim that the RNs are supervisors is premised on their direction of other employees (Br. 36), we have already explained that the RNs provide only limited direction to other members of their teams, based on their experience and special competence, pursuant to the requirements of the resident's treatment plan. See pp. 9-10, *supra*; NLRB Br. 42-43.

dent cites (Br. 3, 35) does not demonstrate that the building supervisors exercise any such judgment. See J.A. 18-19, 63; Tr. 147, 155. To the contrary, respondent's staffing policies specify the minimum number of employees necessary to cover a given shift. J.A. 23-24, 28-29. The building supervisors transfer employees from one unit to another simply "[t]o make sure the head count is there." J.A. 29; see J.A. 22, 27. The record does not establish the basis on which the building supervisors select the transferees.

Respondent also claims (Br. 35) that the building supervisors have authority to "increase the staffing level by arranging coverage from the preceding shift and/or by calling off-duty employees" in the event that "a problem arises with a resident or in the case of weather emergencies." That contention, however, is factually incorrect. The record establishes that the nurses do *not* have independent discretion to staff the facility at a higher level than prescribed by respondent. See J.A. 22, 23-24, 27-29. Neither the Board nor the court of appeals found otherwise, and the evidence cited by respondent does not support respondent's claim.[14] There is also no support for respondent's assertion (without citation to the record) (Br. 28) that the building supervisors "assign overtime." Indeed, the Board made, and the court of appeals accepted, the contrary finding that they do not have authority to compel employees to work. Pet. App. 16a, 51a; see J.A. 38. As we have explained, the building supervisors' actual responsibilities regarding staff coverage are routine

[14] In the testimony cited by respondent, its Administrator explained that the building supervisors "can situationally ask for an increase," for example, "if we have a problem where we need special supervision of a—of a resident." J.A. 24. However, the Administrator testified that, in that event, the building supervisors "would—they would call the person on call and ask for additional approval." *Ibid.*

and do not involve the exercise of independent judgment. See NLRB Br. 44-45.

Respondent further asserts (Br. 35) that the building supervisors "are responsible for overseeing all safety and resident issues that occur." However, the testimony on which respondent relies (J.A. 16-17) does not indicate which (if any) of the supervisory functions listed in Section 2(11) the building supervisors exercise, using independent judgment, in discharging this purported function. Indeed, the court of appeals did not rely on that responsibility to support its (mistaken) holding that the RNs are supervisors. See Pet. App. 18a-19a.

Finally, respondent relies (Br. 35) on the purported authority of the building supervisors to "write up employees" and "to send an employee home" for misconduct. As our opening brief explains, however, the Board properly concluded that respondent failed to prove that the building supervisors actually have that authority. See NLRB Br. 46-48. Respondent contends (Br. 40) that, in reaching that conclusion, the Board "disregarded" several company memoranda and ignored the principle that "[i]t is the existence of authority that counts under the statute, and not the frequency of its exercise." The Board, however, adheres to the principle cited by respondent (see, *e.g.*, *DST Indus., Inc.*, 310 N.L.R.B. 957, 958 (1993)), and did not "disregard" respondent's memoranda. Rather, the Board considered the documents but discounted their significance, considered in light of the full record, under the equally settled principle that "the nearly total lack of evidence of authority actually exercised" may negate "naked designations of 'paper power.'" *Oil Workers Int'l Union* v. *NLRB*, 445 F.2d 237, 243-244 (D.C. Cir. 1971), cert. denied, 404 U.S. 1039 (1972). See *Capital Transit Co.*, 114 N.L.R.B. 617, 619 (1955) ("where the issue is the actual existence of a supervisory power, the absence of any *exercise* of authority may negative its exis-

tence"); NLRB Br. 47-48. Because the record establishes that the building supervisors never exercised the disciplinary authority ostensibly vested in them by the memoranda, and because other evidence suggests that they lack such authority, the Board reasonably declined to find the RNs to be supervisors. See Pet. App. 50a-52a; J.A. 14-15, 26-27, 31, 38, 55-56; NLRB Br. 47.[15]

b. Finally, respondent mistakenly contends that the RNs must be classed as supervisors because they are the most senior employees on site for substantial periods (Br. 36-38), and there would purportedly be an unreasonable ratio of supervisors to employees if the RNs are not supervisors (Br. 38-39). As the Board has explained, "the Act does not state or fairly imply that the highest ranking employee [on site during] a shift is necessarily a supervisor, nor does it indicate that a group of individuals must have supervisory status simply to avoid having a particular ratio of employees to supervisors that, in the estimation of some tribunal, is 'too high.'" *Beverly Enters.—Ohio*, 313 N.L.R.B. 491, 500 (1993). Rather, such "secondary indicia" are "aid[s] in evaluating the existence of supervisory status," but are "not substitutes for the statutorily prescribed powers of Section 2(11)." *MDI Commercial Servs.*, 325 N.L.R.B. 53, 57 (1997). "[U]nless an individual possesses one or more of the statutory indicia of supervisory status, neither the ratio of supervisors to

[15] Similarly, although another memorandum (J.A. 62) states that the building supervisors are "in charge of the facility and all rehabilitation staff," the Board reasonably concluded that, as a practical matter, "the only extra responsibility assumed by the RNs when serving as 'building supervisors' is to obtain needed help if for some reason a shift is not fully staffed." Pet. App. 51a. Respondent's Administrator testified that the building supervisors' responsibility is "[p]rimarily to ensure that there's adequate coverage" and that coverage concerns prompted creation of the role. J.A. 18, 27; see J.A. 20. Moreover, the building supervisors do not consider themselves to be in charge of the rehabilitation staff. J.A. 50.

employees nor the fact that she may be the sole person in charge at times (nor both together) can transform her into a statutory supervisor." *Beverly Enters.—Ohio*, 313 N.L.R.B. at 500. See also NLRB Br. 45-46 & n.21. Because, as we have shown, the RNs do not exercise any supervisory power listed in Section 2(11) using independent judgment, they are not supervisors.[16]

In any event, the secondary indicia on which respondent relies are of limited usefulness in this case. Although the building supervisor "is the highest ranking employee in the building" for "almost two-thirds of the day" (Pet. App. 16a, 18a), a stipulated supervisor is "on call" at those times. *Id.* at 16a; J.A. 39. The building supervisors contact the "on call" supervisor when necessary. See J.A. 24, 52, 53. Respondent's assertion (Br. 39) regarding the ratio of supervisors to employees is also unpersuasive. Although respondent

[16] Respondent incorrectly contends (Br. 31-35), based largely on its inaccurate assertions about the authority of the RNs, that they possess the same authority as nurses found to be supervisors in prior Board cases. The employees found to be supervisors in the prior cases (except for one case that has been overruled) had significantly greater authority than the RNs here. See, *e.g.*, *Nymed, Inc.*, 320 N.L.R.B. 806, 813 (1996) (evaluation of aides); *Newton-Wellesley Hosp.*, 219 N.L.R.B. 699, 700 (1975) (approval of overtime, scheduling, and effective recommendation regarding hiring and firing); *Wing Mem'l Hosp. Ass'n*, 217 N.L.R.B. 1015, 1016 (1975) (authorization of overtime, scheduling, assignments, transfers, evaluations, and effective recommendation regarding hiring); see also note 9, *supra* (discussing *National Living Ctrs., Inc.*). The same is true of the employees to whose supervisory status "the parties stipulated" (Br. 30) in other cases cited by respondent. See, *e.g.*, *Schnurmacher Nursing Home* v. *NLRB*, 214 F.3d 260, 263 (2d Cir. 2000) (administration of the nursing department); *NLRB* v. *Grancare, Inc.*, 170 F.3d 662, 664 (7th Cir. 1999) (en banc) (scheduling and evaluation); *Sherewood Enters., Inc.*, 175 N.L.R.B. 354, 356 n.1 (1969) (discipline, evaluation, and effective recommendation regarding hiring and firing); see also pp. 7-8, *supra* (discussing *Westwood Health Care Ctr.*).

calculates a ratio of 5% if the RNs are deemed to be employees, which respondent regards as unrealistically low, that calculation is flawed.[17]

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For the foregoing reasons, as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed to the extent that the court held that the RNs employed by respondent are supervisors.

Respectfully submitted.

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Solicitor General

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National Labor Relations Board

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[17] Respondent's calculation is based on the unwarranted assumption that the employees "supervised" by the RNs include respondent's kitchen, housekeeping, and maintenance employees, as well as the rehabilitation counselors. See Br. 39. The kitchen, housekeeping, and maintenance employees have their own supervisors, who are stipulated to be Section 2(11) supervisors, and therefore should not be included in the ratio calculation. Pet. App. 45a, 54a; see *Beverly Enters.—Ohio*, 313 N.L.R.B. at 507 n.57. Further, respondent has never contended that the RNs supervise the rehabilitation counselors. A more realistic analysis yields a ratio of 10% if the RNs are treated as employees: 49 employees (6 RNs, 3 licensed practical nurses, and 40 rehabilitation assistants) to 5 supervisors (2 unit coordinators, a nursing coordinator, the administrator, and the assistant administrator). A ratio of 10% is not very different from the 12% figure that respondent deems "reasonable." Br. 39.